IN THE COURT OF APPEALS OF IOWA

No. 0-239 / 09-0871
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY LEE BLANCHARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Chickasaw County, Richard D. Stochl, Judge.

Randy Blanchard appeals from judgment, convictions, and sentences for first-degree murder and child endangerment resulting in death. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, W. Patrick Wegman, County Attorney, and Denise Timmons, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Randy Blanchard appeals from judgment, convictions, and sentences for first-degree murder, in violation of Iowa Code section 707.2(5) (2007), and child endangerment resulting in death, in violation of section 726.6(4). He challenges the sufficiency of the evidence. He also argues that based upon *Heemstra* principles, the murder conviction cannot stand. We affirm.

I. Background.

Aliya was born by caesarean delivery to Annette E. on January 30, 2008. Her father was Randy Blanchard. Aliya came home on Saturday, February 2. On Monday night, Aliya was a healthy five-day-old infant when she awoke for her 3 a.m. feeding. Blanchard told Annette he would get up and feed Aliya.

Annette partially awoke while Blanchard was feeding Aliya and heard him tell the infant to shut up and be quiet. She also thought she heard a noise that sounded like something hitting the glass coffee table in the living room. She went back to sleep and next remembered Blanchard bringing Aliya into the bedroom wearing different clothing and wrapped in a different blanket.

The following day, Aliya was unresponsive and would not take a bottle. Annette called Blanchard at work and told him she wanted to take Aliya to the hospital. Blanchard convinced Annette to wait. When he returned home, he again delayed taking Aliya to the hospital. However, Aliya had a seizure, and Annette and Blanchard took her to the emergency room at Floyd County Hospital. She was later transferred to Covenant Medical Center and then to Mayo Clinic. Aliya did not awaken again. Doctors suspected Shaken Baby Syndrome.

Both parents were questioned by law enforcement after Aliya was hospitalized. During two separate interviews, Blanchard admitted he had shaken the crying Aliya out of frustration, but denied that it could have caused Aliya's severe injuries (one doctor described the injuries as a "ten" on a scale of one to ten, with one being the most minimal and ten being the worst). During the second interview, Blanchard admitted he may have dropped Aliya and she could have hit her head. He demonstrated on video how he had shaken Aliya and admitted that he was frustrated, shook her, and "it was probably maybe a little harder . . . her head would probably go back and forth a little bit." He admitted to having anger problems and that crying babies agitate him, leading him to take actions to silence their cries.

Aliya was declared brain-dead on February 9 and was removed from life support on February 11. She stopped breathing that same date. After an autopsy, Dr. Eric Pfeifer concluded Aliya's cause of death was blunt force trauma to the head with blunt force injury to the brain. He confirmed she had bleeding in the brain, multiple bruises along the base of her spine, and a fractured skull. He also confirmed that the optic nerve had incurred a sheath hemorrhage, which is consistent with inflicted head trauma. Based on his examination and laboratory tests, Dr. Pfeifer ruled out death caused by Vitamin K deficiency, herpes simplex virus, sepsis, and sagittal thrombosis.

Blanchard was charged with first-degree murder and child endangerment resulting in death. He waived trial by jury. Following a trial to the court, at which several doctors testified, the district court made detailed findings of fact and conclusions of law. The district court noted:

> There are two schools of thought in current medical science as to whether the shaking of an infant alone can lead to the injuries found in Aliya Blanchard or whether some blunt force trauma to the head is necessary combined with the shaking of the child to cause death. Defendant's expert clearly takes the position that the simple shaking of an infant alone cannot lead to the type of injuries sustained by Aliya. Several of the physicians from the Mayo Clinic and the doctors of Covenant seem to possess the opposite view. The Court found the testimony of the physicians from the Mayo Clinic and Covenant Medical Center to be very credible and consistent with the physical evidence gathered at the Blanchard residence and the statements and admissions made by Randy Blanchard. Based on the facts of this case, this Court is not required to decide whether shaking alone can cause the death of an infant. Aliya Blanchard suffered a fractured skull which could only have been caused by blunt force trauma to her head. There is no doubt that this young child's head struck something with significant force causing her skull to fracture. This is buttressed by the indication of a coup-contrecoup injury to the brain.

The district court ultimately concluded:

> The overwhelming evidence shows beyond a reasonable doubt that Randy Blanchard violently and without conscience shook and assaulted Aliya Blanchard. This act was done to silence her cries. As a result of that act, the overwhelming evidence shows beyond a reasonable doubt that Aliya suffered a fractured skull and excessive injury to her brain. The overwhelming evidence shows beyond a reasonable doubt that Randy's actions were do[ne] with malice aforethought and with an extreme indifference to the life and well being of his daughter. The overwhelming evidence [ ] shows beyond a reasonable doubt that Randy Blanchard committed Murder in the First Degree. The overwhelming evidence shows beyond a reasonable doubt that Randy Blanchard committed child endangerment leading to the death of Aliya.

Blanchard moved for a new trial, contending the court erred to properly instruct itself by including the possibility of first-degree murder under Iowa Code section 707.2(5) and in failing to apply *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). The motion was denied and concurrent sentences were imposed.

Blanchard now appeals. He contends there is insufficient evidence to sustain the convictions. He also contends a conviction of first-degree murder is precluded by *Heemstra*.

II. Sufficiency of the Evidence.

Blanchard argues there is insufficient evidence to sustain the convictions because (1) there was evidence to suggest that Aliya sustained her injuries while he was not present; (2) there was no showing that he did an intentional act motivated by hatred or an evil or unlawful purpose; and (3) the medical evidence does not conclusively establish that Aliya's death was caused by non-accidental trauma.

We review sufficiency-of-evidence claims for correction of errors at law. *State v. Jorgensen,* 758 N.W.2d 830, 834 (Iowa 2008). If the district court's findings are supported by substantial evidence, we will not disturb the findings on appeal. *State v. Johnson*, 770 N.W.2d 814, 823 (Iowa 2009). Evidence is substantial if, when viewed in the light most favorable to the State, it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Iowa Code section 707.2(5) provides a person commits murder in the first degree under the following circumstances:

> The person kills a child while committing child endangerment under section 726.6, subsection 1, paragraph "b", or while committing an assault under section 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life.

Citing Iowa Criminal Jury Instruction 700.20, the trial court found the State proved beyond a reasonable doubt that:

> 1. On or about the 5th day of February, 2008, the defendant shook and/or struck Aliya Blanchard and/or caused her head to impact a solid object.
> 2. Aliya Blanchard was then under the age of 14.
> 3. Aliya Blanchard died as a result of being shaken, struck or from her head striking a solid object.
> 4.The defendant acted with malice aforethought.
> 5. The defendant was committing the offense of assault.
> 6. Aliya's death occurred under circumstances showing an extreme indifference to human life.

In its written opinion, the district court carefully detailed the evidence, and we find it unnecessary to reiterate those extensive findings here. Blanchard asserts that there was evidence that suggested Aliya's injuries were sustained while Blanchard was elsewhere. However, there was evidence that would convince a reasonable person that Blanchard inflicted Aliya's injuries, including his own admissions. There is substantial record evidence supporting the district court's findings that Blanchard deliberately shook Aliya; that he did so to silence her; and that Aliya's head struck a hard object during Blanchard's actions. Consequently, we reject Blanchard contention that there is insufficient evidence that he inflicted the injuries Aliya suffered.

Blanchard also contends there is insufficient evidence of malice aforethought or extreme indifference to human life. The district court found otherwise, writing:

> The elements of malice aforethought and a manifestation of extreme indifference to human life must be derived from this court's common sense after considering all the circumstances of this case. This court cannot pretend to read the mind of the defendant either now or at the time he assaulted Aliya. What is clear from the evidence is that Randy was aggravated and angry at the time he assaulted Aliya. He was tired as a result of little sleep and his consumption of a large quantity of alcohol the night before. He has a bad temper and is prone to anger outbursts. He had demonstrated frustration with Aliya's crying previously and he

> admitted to having an anger problem. His aggravation and anger at Aliya's crying prompted him to shake her. Responsible adults soothe and comfort crying babies. There is no lawful purpose for shaking and striking the head of a baby. The act screams of malice. Randy intentionally shook a helpless five-day-old infant for a clearly unlawful purpose. His actions were done with Malice aforethought.
>
> This court further concludes that Randy's actions were done with an extreme indifference to the life of Aliya Blanchard. Common sense would tell any parent that the exertion of force on a five-day-old infant will cause serious injury to that child. Randy's actions were done with an extreme indifference to the life of his daughter.

Malice is "that condition of mind which prompts one to do a wrongful act intentionally, without legal justification or excuse." *State v. Love*, 302 N.W.2d 115, 119 (Iowa 1981) (citation omitted), *overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 1986). Because malice is a state of mind, it is often proved, and may be inferred, by circumstantial evidence. *State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003); *State v. Rhode*, 503 N.W.2d 27, 39 (Iowa Ct. App. 1993) (inferring malice from defendant's intentional slamming of child's head against a hard, flat surface causing severe head injuries). We agree with the district court that there is no lawful purpose for intentionally shaking and striking the head of a five-day-old child. Here, the severity and the nature of Aliya's injuries are enough to provide substantial evidence of malice.

Moreover, intentionally shaking and striking the head of a five-day-old child manifests extreme indifference or callousness to human life. *See State v. Thompson*, 570 N.W.2d 765, 768 (Iowa 1997) ("We agree that the phrase 'manifesting an extreme indifference to human life,' when considered in the context of a killing of a child with malice, sufficiently describes the aggravating

circumstance elevating the act from second-degree to first-degree murder so as to need no further or other explanation.").

Additionally, Blanchard points out that his expert witness testified she could not conclude that the only cause of Aliya's death was traumatic brain injury and thus there was insufficient evidence of causation to support the murder conviction. However, the trial court found "the testimony of the physicians from the Mayo Clinic and Covenant Medical Center to be very credible and consistent with the physical evidence gathered at the Blanchard residence and the statements and admissions made by Randy Blanchard." That evidence supports the trial court's finding that Aliya died of traumatic brain injury and that her death was caused by Blanchard's shaking and the blunt force trauma to her head.

The district court concluded Blanchard killed the child while committing an assault, with malice aforethought, and under circumstances demonstrating extreme indifference to her life, which constitutes murder in the first degree under Iowa Code section 707.2(5). The court also found Blanchard guilty of child endangerment resulting in death in that Blanchard was the parent of Aliya, Aliya was under the age of fourteen years, Blanchard acted with knowledge that he was creating a substantial risk to Aliya's health of safety, and Blanchard's actions resulted in Aliya's death.[1] There is substantial evidence to support Blanchard's convictions.

[1] Iowa Code section 726.6(1)(a) provides: "A person who is the parent . . . commits child endangerment when the person . . . .[k]nowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety." If the parent commits child endangerment resulting in the death of the child, the person is guilty of a class "B" felony. Iowa Code § 726.6(4).

III. Applicability of *Heemstra*.

On appeal, Blanchard contends the *Heemstra* analysis should be applied, precluding a conviction for murder in the first degree. At trial, Blanchard's counsel argued that the statute improperly

> bootstrap[s] an assault into First Degree Murder through the use of statuted legislatively created vessels in which to create First Degree Murder out of—without using premeditation and specific intent and deliberation. So in this particular case, my argument is that they in 707.2(5) what they're arguing, that statute, what it does is it bootstraps this in opposition to what the principle of the *Heemstra* decision, I think, expresses.

The district court ruled that *Heemstra* did not apply in the circumstances presented. We agree.

Only the legislature has the power to create and define crime. *State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971). All crimes in Iowa are statutory. *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977). Murder is defined in Iowa Code section 701.1 ("A person who kills another person with malice aforethought either express or implied commits murder."). Section 707.2 defines murder in the first degree in six alternative ways:

> 1. The person willfully, deliberately, and with premeditation kills another person.
> 2. The person kills another person while participating in a forcible felony.
> 3. The person kills another person while escaping or attempting to escape from lawful custody.
> 4. The person intentionally kills a peace officer, correctional officer, public employee, or hostage while the person is imprisoned . . . .
> 5. The person kills a child . . . while committing an assault under section 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life.
> 6. The person kills another person while participating in an act of terrorism as defined in section 708A.1.

In *Heemstra*, 721 N.W.2d at 554, the court compared the alternatives in subsections one and two, noting:

> First-degree murder under Iowa Code section 707.2(1) requires proof that the murder was committed "willfully, deliberately, and with premeditation." In contrast, first-degree murder based on the felony-murder rule under section 707.2(2) does not require proof of any of these elements; they are presumed to exist if the State proves participation in the underlying forcible felony.

"The rationale of the felony-murder rule is that certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder." *Heemstra*, 721 N.W.2d at 554. The court noted that in Iowa, "willful injury is a forcible felony under Iowa Code section 702.11 and, in *some circumstances,* may serve as a predicate for felony-murder purposes." *Id.* at 557. However, the court stated, "The legislature has never considered the issue of whether, when the act causing willful injury is the same as that causing death, the two acts should be deemed merged." *Id.* The court held, "if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." *Id*. at 558. The court expressed concern that "[o]therwise all assaults that immediately precede a killing will bootstrap the killing into first-degree murder, and all distinctions between first-degree and second-degree murder would be eliminated." *Id*. at 557.

The concerns expressed about felony-murder in *Heemstra* are not presented in section 707.2(5). In *State v. Thompson*, 570 N.W.2d 765, 767 (Iowa 1997), our supreme court noted that "[o]ur legislature passed this child

homicide statute in 1994 as part of a comprehensive act targeting juvenile justice and the protection of children."

> [B]y enacting section 707.2(5), the legislature has not merely elevated recklessness-based manslaughter to recklessness-based murder. Premised on murder, not recklessness, the statute identifies additional elements distinguishing it from second-degree murder: (1) a child victim, (2) the killing occurs during an assault, and (3) the death occurs under circumstances manifesting an extreme indifference to human life. *The crime fits logically into the continuum of homicide offenses which reveals "a gradation of culpability commensurate with the gradation of punishment."* The "extreme indifference" element stands apart from, and in addition to, the element of malice.

Thompson, 570 N.W.2d at 769 (emphasis added) (citations omitted). The "bootstrapping" argument proposed by Blanchard is inapposite because, as noted in *Thompson*, section 707.2(5) requires not only a showing that the child was killed during an assault, but also with malice (the definition of murder under section 707.1), and "under circumstances manifesting an extreme indifference to human life." *Id.* We are not here concerned with eliminating "all distinctions between first-degree and second-degree murder." *Heemstra*, 721 N.W.2d at 557. Rather, "[t]he 'extreme indifference' element stands apart from, and in addition to, the element of malice." *Thompson*, 540 N.W.2d at 769.

The district court correctly concluded *Heemstra* does not preclude a finding of first-degree murder.

IV. Conclusion.

Substantial evidence supports the defendant's child endangerment resulting in death and first-degree murder convictions. The district court did not err in concluding *Heemstra* did not apply. We therefore affirm.

AFFIRMED.